Supreme Court, U. S.
FILED
MAR 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-994

In the Supreme Court of the United States

OCTOBER TERM, 1977

MARY ETHEL MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 565 F. 2d 1065.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1977, and a petition for rehearing was denied on December 12, 1977. The petition for a writ of certiorari was filed on January 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in a case where husband and wife are codefendants and one spouse invokes the maritial privilege, the trial court has a duty to inquire *sua sponte* if

the other spouse wishes to testify on his or her own behalf and, if one spouse does, automatically order a severance as to the other spouse.

2. Whether a federal district court can independently determine the validity of a search under federal law where the search had previously been found unlawful in a state proceeding.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted of eleven counts charging possession with intent to distribute heroin and cocaine (Counts X and XI), distribution of heroin (Counts III-IX) and conspiracy to commit the substantive offenses (Counts I and II) in violation of 21 U.S.C. 841(a)(1) and 846.[1] She was sentenced to concurrent fifteen-year terms of imprisonment to be followed by twenty-five years' special parole on each count and fined $25,000. The court of appeals affirmed (Pet. App. 1-12; 565 F. 2d 1065).

The evidence showed a conspiracy to distribute heroin from April to November 1975. Petitioner's cousin James Kinsey distributed heroin on seven separate occasions to a drug enforcement agent and an informer in Pasco, Washington. Kinsey usually obtained his heroin from petitioner's sister, Vernice Garrett, in Pasco. Vernice Garrett was supplied, in turn, by petitioner and her husband, Jackson Morgan, who resided together in Los Angeles, California. Petitioner sometimes transported the

[1]Petitioner's co-defendants Vernice Garrett, James Kinsey and Jackson Morgan were also convicted on each count. The jury acquitted Jessie Garrett on the distribution counts and failed to reach a verdict as to him on the remaining counts.

heroin from Los Angeles to Pasco, and, when Vernice Garrett was absent from Pasco, she personally supplied Kinsey. A search of petitioner's Los Angeles apartment conducted in October 1975 produced 126 grams of cocaine, 208 grams of heroin, over $16,000 in cash, including several bills used by the narcotics agent to purchase heroin from Kinsey, and other narcotics paraphernalia (Tr. 248-335, 402-488, 619-707, 1125-1168, 1194-1195, 1214-1238).

ARGUMENT

1. At the conclusion of the government's case in chief petitioner's attorney apprised the court for the first time that she would not testify because her husband had invoked the marital privilege (Tr. 1287-1288):

> MR. MAXEY [Petitioner's Attorney]: I instructed my client, Mary Ethel Morgan, and she has agreed with me, that she would be a witness in this case, but she—her husband refuses to allow her to testify. And although, under the latest Federal seminar [sic] rules, you remember, that case, we discussed, admitted—I am in a dilemma over which I cannot handle it, and in view of this expressed objection, she refuses to testify, but I am calling it to the Court's attention, and there is no inappropriateness on the part of Counsel about this.
>
> THE COURT: Well, this creates a problem. There are probably two different aspects to this privilege. One has to do with a confidential communication, and, of course, I don't know whether that is involved in your problem or not. And then there is a general communication in testimony between spouses. I think probably each spouse has a right to raise the question.

> MR. MAXEY: Well, it has been raised, and I don't want to be left with the jury in your considered judgment, I would ask that it be called to the jurors' attention, but I leave it up to you. You know the dilemma I am in, and I am not going to call her in the presence of the jury because then it might create a mistrial, and that is why I am calling it to your attention now.

Petitioner never made an offer of proof as to the substance of her proposed testimony and never attempted to testify. Nor did she move for a severance or seek a mistrial on the ground that her husband had invoked the marital privilege.[2]

Petitioner contends that the trial court had a duty *sua sponte* to ask her whether she wished to testify, in order to determine whether her testimony would violate her husband's marital privilege and then to declare a mistrial and sever her case. This claim is without merit.

Petitioner may be correct in suggesting that a defendant's right to give evidence overrides the matrimonial privilege. Cf. *Ferguson* v. *Georgia*, 365 U.S. 570, 598-603 (opinions of Frankfurter and Clark, JJ.). But that issue is not presented here because petitioner, at trial, did not challenge her husband's assertion of the matrimonial privilege. Nor, indeed, did she ask for a severance or show, by an offer of proof or otherwise, that the privilege claim, if applicable, would inhibit the testimony she would give.

Petitioner could easily have anticipated prior to trial that any attempt by her to testify adversely to her husband's interest would violate the marital privilege.

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[2]Prior to trial and during trial petitioner moved for a severance for the different reason, which she has since abondoned, of calling her co-defendants as witnesses (Tr. 1551-1553).

Although the initial joinder of the spouses as co-defendants was permissible under Rule 8(b), Fed. R. Crim. P. (see *United States* v. *Figueroa-Paz*, 468 F. 2d 1055, 1057 (C.A. 9)), petitioner could have moved for a severance on that ground before the jury was impaneled and the government had presented its case. Having failed to make a timely motion, petitioner waived her right to a severance. *United States* v. *Edwards*, 549 F. 2d 362, 366 (C.A. 5); *United States* v. *Caldwell*, 543 F. 2d 1333, 1358 (C.A.D.C.); *United States* v. *Johnson*, 540 F. 2d 954, 959 (C.A. 8).[3]

Furthermore, after the government had rested, if petitioner wished to testify in her own behalf she should have made an offer of proof. Her husband had a right to invoke the marital privilege only to prevent her from testifying adversely to his interest (*Hawkins* v. *United States*, 358 U.S. 74)[4] or to prevent her from revealing his

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[3]This Court's holding in *Schaffer* v. *United States*, 362 U.S. 511, 516, that a trial judge in a conspiracy case "has a continuing duty at all stages of the trial to grant a severance if prejudice does appear" is not to the contrary. *Schaffer* involved a situation, unlike the present, where the need for a severance could not be anticipated prior to trial. Here, petitioner's desire to testify about matters protected by the marital privilege could have been anticipated prior to trial and could therefore be waived.

[4]Petitioner also asks the Court to overrule *Hawkins*, *supra*, and to hold that she may voluntarily testify against her defendant-husband without his consent. She made no such objection to the marital privilege in the district court and therefore did not preserve the argument for appellate review, see *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7. Moreover, her argument that "the testifying spouse should be the party to invoke said privilege in that if the marriage has deteriorated to such an extent that a spouse will voluntarily testify in her own defense, against another, is, in fact, a strong indication that the marriage is already gone" (Pet. 6), regardless of its merits as a general proposition, does not apply here. To the contrary, petitioner remained a "devoted" wife throughout (Tr. F 27-30).

confidential communications to her (*Blau* v. *United States*, 340 U.S. 332-333; *Wolfle* v. *United States*, 291 U.S. 7). But, the marital privilege would not have precluded petitioner from giving testimony which was neither adverse to her husband's interest nor a confidential communication (*Funk* v. *United States*, 290 U.S. 371).[5] An offer of proof would have enabled the court to determine whether her testimony would be compatible with the marital privilege. Having failed to make such timely offer, petitioner should not be permitted to raise the belated claim that she was denied her right to testify in her own behalf.

2. The October 1975 search of petitioner's Los Angeles apartment was determined to have been unlawful in a California state court proceeding but was subsequently held valid in federal district court in the present case. Petitioner does not claim that the district court's ruling was erroneous but rather contends that the state court's finding that the search was invalid was binding on the federal court, and that *Elkins* v. *United States*, 364 U.S. 206, 223-224, and *Rios* v. *United States*, 364 U.S. 253, which reject that position, should be overruled. As this Court stated in *Elkins, supra*, at 224:

> The test [for the validity of a search and seizure] is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

That maxim prevails today, and petitioner offers no reason to abandon it. The states have always been free to accord an accused greater rights than the Constitution

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[5]For example, petitioner presented three witnesses who testified that she traveled to Pasco, Washington, in 1975 to visit her family and to repair properties that she owned there. (Tr. 1292-1346). Had she testified to these facts, the marital privilege would not have been violated.

mandates. See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 719; *Cooper* v. *California*, 386 U.S. 58, 62; *Sibron* v. *New York*, 392 U.S. 40, 60-61. It is settled that the admissibility of evidence in the federal courts is a question of federal law that is judged by federal standards. See *Ker* v. *California*, 374 U.S. 23, 31-32; *On Lee* v. *United States*, 343 U.S. 747, 754-755; *Olmstead* v. *United States*, 277 U.S. 438, 468. Here, the district court properly made an independent evaluation of the legality of the search of petitioner's apartment and, determining that it complied with the Fourth Amendment, properly admitted the evidence which had been found in that search.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

DOJ-1978-02